United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 16, 1998 Decided April 14, 1998

No. 97-3023

UNITED STATES OF AMERICA,
APPELLEE

v.

DAVID M. DALE,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 90cr00027-01)

Jeffrey S. Parker argued the cause for the appellant.

Stuart G. Nash, Assistant United States Attorney, argued the cause for the appellee. *Mary Lou Leary*, United States Attorney at the time the brief was filed, and *John R. Fisher*, *Mary Patrice Brown*, *Thomas R. Eldridge* and *Mark H. Dubester*, Assistant United States Attorneys, were on brief.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: WALD, SILBERMAN and HENDERSON, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* HENDERSON.

Concurring opinion filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: Appellant David M. Dale invokes the federal habeas corpus statute, 28 U.S.C. § 2255,[1] to challenge his fraud and conspiracy convictions on the ground that under *United States v. Gaudin*, 515 U.S. 506 (1995), issued after Dale's convictions became final, the district court erroneously decided as a question of law, rather than remitting to the jury as a question of fact, the materiality of misrepresentations for which Dale was convicted of violating 18 U.S.C. § 1001.[2] Because Dale failed either

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[1] Section 2255 provides in relevant part:

> **Federal custody; remedies on motion attacking sentence**
>
> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

[2] Section 1001 provides in relevant part:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
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> (1) falsifies, conceals, or covers up by any trick, scheme, or device a *material* fact;
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> (2) makes any *materially* false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any *materially* false, fictitious, or fraudulent statement or entry;

to raise the alleged error during his criminal prosecution or to establish in this proceeding "cause and prejudice" to excuse his procedural default, we conclude that he is not entitled to the relief he seeks.

The details of Dale's charged offenses and of his trial are set out at length in *United States v. Dale*, 991 F.2d 819 (D.C. Cir.), *cert. denied*, 510 U.S. 1030 (1993), (*Dale I*) and it is unnecessary to repeat them here. At the end of the day the jury convicted Dale of conspiracy (18 U.S.C. § 5371) (count 1) and of six substantive offenses: subscribing to a false tax return (26 U.S.C. § 7206(1)) (count 2); attempted tax evasion (26 U.S.C. § 7201) and aiding and abetting therein (18 U.S.C. § 2) (count 4); wire fraud (18 U.S.C. § 1343) and aiding and abetting therein (18 U.S.C. § 2) (count 5); concealing facts by trick, scheme and artifice (18 U.S.C. § 1001) and aiding and abetting therein (counts 7 and count 9); and making false statements (18 U.S.C. § 1001) and aiding and abetting therein (18 U.S.C. § 2) (count 10). Before deliberations the judge had expressly instructed the jury that the misrepresentations alleged in violation of section 1001 (counts 7, 9 and 10) "are material." App. A82. On July 15, 1991 the trial judge sentenced Dale to 41 months' imprisonment on the conspiracy count and a concurrent 30-month sentence on each of the other 6 counts, to be followed by 2 years' supervised release. The judge also imposed a $350 special assessment, a $675,000 fine and a $58,000 assessment for incarceration costs. In an opinion issued April 6, 1993 we affirmed Dale's convictions and sentence with one exception—we reversed the count 2 conviction of subscribing to a false tax return, which merged with the count 4 conviction of attempted tax evasion, and remanded for appropriate resentencing. *See Dale I.* The United States Supreme Court denied Dale's petition for certiorari on December 3, 1993. *Dale v. United States*, 510 U.S. 1030 (1993). The district court resentenced Dale on August

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shall be fined under this title or imprisoned not more than 5 years, or both.

18 U.S.C. § 1001(a) (emphasis added).

24, 1994 in accordance with our remand. No appeal was taken from the new sentence.

On June 19, 1995 the United States Supreme Court issued its decision in *United States v. Gaudin*, holding that because materiality is an element of a section 1001 offense the Fifth and Sixth Amendments to the United States Constitution require that a conviction thereof rest on a *jury* finding of materiality. On February 8, 1996 Dale filed a motion in the district court for collateral relief from his convictions pursuant to 28 U.S.C. § 2255 on the ground that under *Gaudin* the trial judge usurped the jury's function by ruling as a matter of law that the misrepresentations alleged in counts 7, 9 and 10 were material. The district court denied the relief sought, concluding that *Gaudin* established a new rule of constitutional procedure that should not be retroactively applied to criminal convictions already final at the time the decision issued. Without reaching the retroactivity issue, we affirm the district court on the ground that Dale is procedurally barred from arguing *Gaudin* error in a habeas proceeding. Having failed to argue in his criminal prosecution that materiality was a jury issue, either before the district court or on appeal, Dale now "must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 167–68 (1982). To establish "actual prejudice," he "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 170.[3] Dale has failed to meet his burden.[4]

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[3] It is not clear whether the showing of prejudice required to cure procedural default is identical to—or greater than—the showing required to establish ineffective assistance of counsel, namely, that "there is *a reasonable probability* that, but for [the errors], the result of the proceeding would have been different," *Strickland v. Washington*, 466 U.S. 668, 693 (1984) (emphasis added). *See United States v. Walling*, 982 F.2d 447, 449 (10th Cir. 1992); *Freeman v. Lane*, 962 F.2d 1252, 1258–59 & n.5 (7th Cir. 1992); John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Proce-*

The three section 1001 convictions were based on Dale's failure to disclose interests in and relationships with foreign corporations on forms he filed with the Department of Defense to obtain security clearance. *See Dale* I, 991 F.2d at 828–29. In each case the filed form specifically requested the information withheld and Dale has suggested no facts or theory to rebut the district judge's legal conclusion that the charged nondisclosures were material to the Department's decision whether to grant clearance. Nor did Dale—or his co-defendant charged with the same nondisclosures—attempt to challenge the judge's materiality conclusion on direct appeal. In the absence of any basis for finding Dale's misrepresentations were not material, we cannot say that the judge's failure to submit materiality to the jury "worked to [Dale's] actual and substantial disadvantage." The failure therefore was not prejudicial.

Dale asserts that a *Gaudin* error "cannot be harmless, because it requires speculation about what a hypothetical jury could have decided, had it been allowed to do so." Reply Br. at 17 (citing *Waldemer v. United States*, 106 F.3d 729, 731–32 (7th Cir. 1997)). We disagree. In *Johnson v. United States*, 117 S. Ct. 1544, 1550 (1997), the Supreme Court held that the trial judge's *Gaudin* error was not "plain error"—so as to justify reversal on direct appeal in the absence of an objection made at trial—where "the evidence supporting materiality was 'overwhelming,' materiality was "essentially uncontroverted" and the appellant "presented no plausible argument"

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dural Default in Federal Habeas Corpus, 57 U. Chi. L. Rev. 679, 684–85 n.25 (1990). Circuit precedent suggests that habeas prejudice may require a greater showing, namely, "*by a preponderance of the evidence*, that the outcome of his trial would have been different but for the errors in question." *See United States v. Saro*, 24 F.3d 283, 287 (D.C. Cir. 1994) (emphasis added). In any event, the standard has not been satisfied here.

[4] Because we find no showing of prejudice we need not decide whether Dale has satisfied the "cause" prong of the default standard.

that the charged misrepresentation was not material. We can only conclude that the same error can in similar circumstances be nonprejudicial under the *habeas* standard which requires a "showing of prejudice" that "is significantly greater than that necessary under 'the more vague inquiry suggested by the words "plain error."' " *See Murray v. Carrier*, 477 U.S. 478, 493 (1986) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)); *see also Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) ("The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal."); *United States v. Saro*, 24 F.3d 283, 287 (D.C. Cir. 1994) (quoting *Murray v. Carrier*, 477 U.S. at 494).[5]

Finally, Dale argues—belatedly and improvidently in a post-argument letter filed with the court on March 20, 1998 purportedly pursuant to Local Rule 28(j)[6]—that, even if he

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[5] In *Waldemer v. United States*, 106 F.3d 729 (7th Cir.1996), on which Dale relies, the Seventh Circuit concluded a *Gaudin* error was necessarily prejudicial because the government could not "demonstrate that [the petitioner's] trial jury actually determined that the statements were material," stating: "Our cases hold ... that if an element of an offense is not actually found by a jury, appellate court musings as to the actions of a hypothetical rational jury cannot render such an error harmless." 106 F.3d at 732. The Supreme Court's subsequent decision in *Johnson* establishes that, to the contrary, an actual jury finding of materiality is not necessary to render a *Gaudin* error harmless.

[6] Rule 28(j) provides:

> When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall *without argument* state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

has not demonstrated prejudice he is entitled to collateral relief to prevent a "miscarriage of justice." It is true that a showing of "fundamental miscarriage of justice" may excuse default when cause and prejudice are not shown. *See Schlup v. Delo*, 513 U.S. 298 (1995); *United States v. McKie*, 73 F.3d 1149 (D.C. Cir. 1996). The petitioner must then "show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent,' " that is, that "it is more likely than not that no reasonable juror would have convicted him" but for the error. *Schlup*, 513 U.S. at 326 (quoting *Murray v. Carrier*, 477 U.S. at 496). Having concluded that Dale failed to meet the habeas prejudice standard, we do not think he can possibly claim a miscarriage of justice which requires "a stronger showing than that needed to establish prejudice." *Id.* We therefore reject this last ditch argument.

For the foregoing reasons the judgment of the district court is

Affirmed.

D.C. Cir. R. 28(j) (emphasis added).

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring:

I agree with the majority opinion that, having failed to object to the judge's materiality determination at any stage of his criminal prosecution and having failed to establish in the habeas proceeding that he was prejudiced by the determination, Dale would be procedurally barred from raising the *Gaudin* error—if he were otherwise entitled to its benefit. He is not. In *Teague v. Lane*, 489 U.S. 288 (1989), a plurality of the United States Supreme Court declared: "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310. The plurality set out two exceptions to the general rule: (1) "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" *id.* at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)); and (2) "a new rule should be applied retroactively if it requires the observance of 'those procedures that ... are implicit in the concept of ordered liberty,'" *id.* (quoting *Mackey*, 401 U.S. at 693) (internal quotation omitted). A majority of the Court has since repeatedly applied both the *Teague* plurality's retroactivity rule and its two exceptions. *See, e.g., Gilmore v. Taylor*, 508 U.S. 333 (1993); *Saffle v. Parks*, 494 U.S. 484 (1990); *Butler v. McKellar*, 494 U.S. 407 (1990); *Penry v. Lynaugh*, 492 U.S. 302 (1989). I believe that *Gaudin* established the kind of new rule of constitutional procedure governed by *Teague* and that it fits within neither of the two *Teague* exceptions. I therefore conclude, as did the district court, that *Gaudin*'s holding does not apply retroactively to Dale's convictions.

As a threshold matter, to come under *Teague*'s retroactivity regime, an intervening court decision must produce "a new constitutional rule of criminal procedure." That the *Gaudin* rule, which derives from a defendant's Fifth and Sixth Amendment rights, is a constitutional one cannot be doubted. The rule is plainly also one of procedure—it simply dictates

who must decide the statutory element of materiality—it tells us nothing of what constitutes a substantive violation of the statute. *Cf. United States v. McKie*, 73 F.3d 1149, 1151 (D.C. Cir. 1996) (court's interpretation of "substantive terms" of criminal statute is not "procedural" rule subject to *Teague*). Moreover, I believe the *Gaudin* rule was also a "new" rule when formulated.

The Supreme Court acknowledged in *Teague* that "[i]t is admittedly often difficult to determine when a case announces a new rule" and it would "not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes." *Teague*, 489 U.S. at 301; *see also Mackey*, 401 U.S. at 667, 693 (1971) (Harlan, J., concurring in judgment in part and dissenting in part) ("[I]n *Desist* [v. United States, 394 U.S. 244, 263 (1969)] I went to some lengths to point out the inevitable difficulties that will arise in attempting 'to determine whether a particular decision has really announced a "new" rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.' I remain fully cognizant of these problems. . . ."). The *Teague* Court nevertheless offered guidance for deciding which rules are "new" ones: "In general, . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis original). The *Gaudin* rule comes easily within the latter characterization. Not only was *Gaudin*'s holding "not dictated by precedent existing at the time," it was *contrary to* both Supreme Court precedent and that of a large majority of the circuit courts of appeal.

As the Supreme Court noted, the holding in *Gaudin* was inconsistent with its earlier decision in *Sinclair v. United States*, 279 U.S. 263 (1929). In *Sinclair* the Court had rejected a Sixth Amendment challenge to a trial court's determination of "pertinency" in a criminal contempt proceeding for violation of 2 U.S.C. § 192, which criminalized refusal

by a Congressional witness "to answer any question pertinent to the question under inquiry."[1] While *Sinclair* was "not controlling in the strictest sense, since it involved the assertion of a Sixth Amendment right to have the jury determine, not 'materiality' under § 1001, but rather 'pertinency' under [2 U.S.C. § 192]," the Court nonetheless acknowledged that it "[could not] hold for respondent ... while still adhering to the reasoning and the holding of that case," 515 U.S. at 519–20. The *Gaudin* Court was therefore required to "repudiate" much of the "reasoning" in *Sinclair*. *Id.* at 520. At the same time the Court also repudiated the holdings of eleven circuit courts of appeal, which had held that materiality was a question of law to be decided by the judge. *See* 515 U.S. at 527 (Rehnquist, J., concurring) ("Before today, every Court of Appeals that has considered the issue, except for the Ninth Circuit, has held that the question of materiality is one of law.") (citing *United States v. Gaudin*, 28 F.3d 943, 955 (9th Cir. 1994) (Kozinski, J., dissenting) (listing opinions from eleven circuits so holding)).[2] Given the overwhelming, con-

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[1] The statute provided in full:

> "Every person who having been summoned as a witness by the authority of either house of Congress, to give testimony or to produce papers upon any matter under inquiry before either house, or any committee of either house of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months."

279 U.S. at 284 (quoting 2 U.S.C. § 192).

[2] The Ninth Circuit dissent cited the following decisions: *United States v. Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States v. Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); *United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir. 1984); *United States v. Greber*, 760 F.2d 68, 73 (3d Cir. 1985); *Nilson Van & Storage Co. v. Marsh*, 755 F.2d 362, 367 (4th Cir. 1985); *United States v. Hausmann*, 711 F.2d 615, 616–17 (5th Cir. 1983); *United States v. Chandler*, 752 F.2d 1148, 1150–51 (6th Cir. 1985); *United States v. Brantley*, 786

trary precedent the *Gaudin* Court overruled, I must conclude that its opinion established a "new" rule which cannot be applied retroactively unless it comes within one of the two exceptions recognized in *Teague* and its progeny[3]—and the *Gaudin* rule does not.

Conceding that the first exception does not apply, Dale asserts that the *Gaudin* rule comes within the second exception as one "requir[ing] the observance of 'those procedures that ... are implicit in the concept of ordered liberty.'" 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 693) (internal quotation omitted). In this he errs. The second *Teague* exception is reserved "for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (quoting *Teague*, 489 U.S. at 311). The Supreme Court has "usually cited *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception." *Id.* The *Gaudin* rule is not of the same type. It "has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception" and, as the majority opinion demonstrates, its breach "would not seriously diminish the likelihood of obtaining an accurate determination." *Butler v. McKellar*, 494 U.S. 407, 416 (1990). *Gaudin*'s holding therefore is not within the "small core of rules" that implicate the

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F.2d 1322, 1327 & n.2 (7th Cir. 1986); *United States v. Hicks*, 619 F.2d 752, 758 (8th Cir. 1980); *United States v. Daily*, 921 F.2d 994, 1004 (10th Cir. 1990); *United States v. Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir. 1984); *United States v. Hansen*, 772 F.2d 940, 950 (D.C. Cir. 1985). 28 F.3d at 955.

[3] Dale argues that *Teague* does not prevent retroactive application of new rules in collateral challenges to federal (rather than state-court) convictions. This court, however, has twice recognized *Teague*'s applicability to federal conviction challenges. *See United States v. McKie*, 73 F.3d 1149, 1150 (D.C. Cir. 1996); *United States v. Ayala*, 894 F.2d 425, 429 n.8. (D.C. Cir. 1990).

second *Teague* exception. *See Graham v. Collins*, 506 U.S. 461, 477 (1993) (quoting *Teague*, 489 U.S. at 311).

For the foregoing reasons I believe that the rule announced in *Gaudin* should not be given retroactive effect. *Accord Bilzerian v. United States*, 127 F.3d 237 241 (2d Cir. 1997); *United States v. Swindall*, 107 F.3d 831, 836 (11th Cir. 1997). I would therefore affirm the district court on that basis.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-3023 **September Term, 1997**

United States of America, No. 90cr00027-01

Appellee

Filed Apr 24 1998

v.

David M. Dale,

Appellant

Before: WALD, SILBERMAN and HENDERSON, *Circuit Judges.*

ORDER

It is ORDERED by the court that the opinion filed by the court on April 14, 1998 be amended as follow:

Page 2, line 2: Replace "Opinion for the court filed by *Circuit Judge* HENDERSON" with "Opinion for the court filed *Per Curiam*".

Page 2, line 4: Replace "KAREN LECRAFT HENDERSON, *Circuit Judge*" with "*PER CURIAM*".

Per Curiam

For the Court:

Mark Langer

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed Feb 13 1997

United States of America,

Plaintiff,

v. Criminal No. 90-0027(JGP)

David M. Dale,

Defendant.

MEMORANDUM

This matter is before the Court on Defendant Dale's Motion for Relief from Conviction Pursuant to 28 U.S.C. § 2255. Dale files this motion in light of the Supreme Court's decision in *United States v. Gaudin*,-- U.S. –, 115 S. Ct. 2310 (1995). He argues that this Court erred in not permitting the jury to decode whether his false statements to government agencies were material to those agencies' decision-making. In response, the government argues that *Gaudin* established a new constitutional rule that should not be applied to a case that became final before the announcement of *Gaudin*. The question before this Court is whether *Gaudin* retroactively applies to Dale even though his case became final almost two years before the Supreme Court announced *Gaudin*.

I.

A jury found David Dale guilty of various tax-related crimes

on July 15, 1991.[1] Dissatisfied with the jury verdict, Dale sought review by the Court of Appeals. The Court of Appeals affirmed the verdict below in all respects except for collapsing to counts of the indictment into one because, the Court of Appeals said, two of the criminal offenses should have merged into a single offense.[2] *United states v. Dale*, 301 U.S. App. D.C. 110, 149-150, 991 F. 2nd 819, 859 (1993). The Supreme Court denied *certiorari* in his case on December 13, 1993. *United States v. Dale*, – U.S. –, 114 S. Ct. 650 (1993).

Almost two years after the Supreme Court denied *certiorari* in Dale's case, on June 19, 1995, it announced its decision in *United States v. Gaudin*, – U.S. –, 115 S.Ct. 2310 (1995). That case overruled long-standing Supreme Court and District of Columbia Circuit precedent. The Supreme Court concluded that the jury – not the judge – should determine whether a statement is material when materiality is an element of a crime. *Id.*

In the *Gaudin* case, the defendant had been charged with making false statements to multiple government agencies. *Id.* At –, 115 S.Ct. At 2312. Like this Court at Dale's trial, Gaudin's trial judge concluded that the question of law for the judge to decide. *Id.* At –,

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1 Specifically, the jury found Dale guilty of the following crimes: (1) conspiracy (a) to defend the United States by impeding the Internal Revenue Service's assessment and collection of taxes and (b) to commit other offenses against the United States, violating 18 U.S.C § 7206 (1) (Count One); (2) subscribing to a false tax return, violating 26 U.S.C. § 7206 (1) (Count Two); (3) attempted tax evasion, violating 26 U.S.C. § 7201, and aiding and abetting, violating 18 U.S.C § 2 (Count Four); (4) wire fraud, violating 18 U.S.C. § 1343, and aiding and abetting, violating 18 U.S.C. § 2 (Count Five); (5) concealing material facts by trick, scheme, or artifice, violating 18 U.S.C § 1001 (Count Seven); (6) concealing material facts by trick, scheme, or artifice, violating 18 U.S.C. § 1001 (Count Nine); and (7) making false statements, violating 18 U.S.C. § 1001, and aiding and abetting, violating 18 U.S.C. § 2 (Count Ten).

2On April 6, 1993, the Court of Appeals found that Dale's convictions for subscribing to and aiding the preparation of false tax returns merged into the "capstone" offense of tax evasion. *United States v. Dale*, 301 U.S. App. D.C. 110, 149-150, 991 F. 2nd 819, 859 (1993) (internal quotations omitted). As a result, the lesser included offenses of subscribing and aiding and abetting were vacated on remand to this Court.

15 S.Ct. At 2313. The trial judge found that the defendant's false statements were material and so instructed the jury. *Id.* As was Dale's fate, the jury ultimately found Gaudin guilty. *Id.* At –, 115 S. Ct. at 2312.

On review, the Ninth Circuit Court of Appeals reversed the trial court's ruling on materiality. *Id.* At –. 115, S. Ct. at 2313. The appellate court said that removing the materiality issue from the jury's purview violated Gaudin's Fifth Amendment right to due process and his Sixth Amendment right to a trial by jury. *Id.* The Ninth Circuit's decision eventually found its way to the Supreme Court where the Justices unanimously affirmed it:

> The Constitution [under the Fifth and Sixth Amendments] gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; [Gaudin] therefore had a right to have the jury decide materiality. . . .
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> . . . .
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> . . . The trial judge's refusal to allow the jury to pass on the "materiality" of Gaudin's false statements infringed on that right.

Id. at –, 115 S. Ct. at 2314, 2320. By holding thus, the Supreme Court reversed itself and overruled every circuit that had considered the materiality issue except the Ninth. *Id.* at –, 115 S. Ct. at 2318, 2322.

Notably, while the Supreme Court resolved the materiality issue, it left two other issues unresolved. The high court explicitly declined to decide:

(1) whether materiality is an element of every crime committed under 18 U.S.C. § 1001 (in *Gaudin*, the parties had stipulated that the criminal offense required that the prosecution prove materiality). *Id.*

at –, 115 S. Ct. at 2320;[3]

(2) whether *Gaudin* error is tantamount to harmless error or plain error. *Id.* at –, 115 S.Ct. At 2321.[4]

Because of the Supreme Court's holding in *Gaudin*, Dale has lodged a collateral attack against his judgement of conviction by invoking 28 U.S.C. § 2255. He seeks to have *Gaudin's* materiality rule retroactively applied to his case and, on that basis, requests that this Court vacate each of his convictions.

II.

If *Gaudin* is to be applied retroactively to Dale, it must be done within the constitutional rubric developed by the Supreme Court in *Teague V. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). In that case, the Supreme Court drew a clear line as to when newly announced constitutional rules would apply retroactively to pre-existing cases. Until *Teague*, Supreme Court precedent on retroactive application has been cloudy. But a clearer, more predictable method for determining the appropriateness of retroactive application was necessitated by *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1989), a case that potentially had far-reaching application.

Batson established a new constitutional rule that changed the *prima facie* test for showing racial discrimination in jury selection and banned race-based peremptory challenges. *See Teague,* 489 U. S. at 295, 109 S. Ct. at 1607. The Supreme Court

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3 Dale petitions this Court to vacate each of his convictions and the government largely concedes that materiality is an element of most of the crimes for which Dale was convicted. But the government argues that Dale's convictions for attempted tax evasion (Count Four) and Wire Fraud (Count Five) required no showing of materiality (and were so instructed at trial) and should not be affected by an unfavorable decision. (Government's Opposition to Defendant's Motion for Relief from Conviction Pursuant to 28 U.S.C. § 2255 at 33-36.)

4 Dale does not argue any error standard. Instead, his argument is that he has suffered actual prejudice caused by this Court's failure to allow the jury to decide the materiality issue. (Memorandum in Support of Defendant's Motion for Relief From Conviction Pursuant to 28 U.S.C. § 2255 at 31-33.)

found that *Batson was a* "substantial break with prior precedent." *Id.* (quoting *Allen v. Hardy*, at 478 U.S. 255, 258, 196 S. Ct. 2878, 2880 (1986). And it noted that Teague's conviction had become final two and one-half years prior to *Batson. Id.* The Court concluded that *Batson* should not be retroactively applied to criminal convictions on collateral review; therefore, Teague could not benefit from *Batson's* new jury-selection rule. *Id.*

After denying the applicability of *Batson* to Teague's claim, the Supreme Court went on to articulate a clear standard for when a new constitutional rule should be applied retroactively. It said that a new rule should not be retroactively applied to cases that became final before the new rule's announcement unless the new rule (1) decriminalizes a class of conduct or (2) is a watershed rule of procedure essential to fundamental fairness. *Id.* at 311, 109 S. Ct. at 1075-76.

A. Applicability of Teague v. Lane to Dale's § 2255 Motion

Teague first applied the state-prisoner habeas petitions, but other courts have extended its logic to federal-prisoner habeas petitions under 18 U.S.C. § 2255. *See Nazon v. United States*, 936 F. Supp. 563, 568-569 (N.D. Ind. Aug. 7, 1996) (citing *Van Daahwyk v. United States*, 21 F. 3d 179, 183) (7th Cir. 1994). This Court finds that the *Teague* doctrine applies to Dale's habeas petition.

1. Is Gaudin a New Rule under Teague?

Dale contends that *Gaudin* does not establish a new constitutional rule. (Reply Memorandum in Support of Defendant's Motion for Relief from Conviction Pursuant to 28 U. S. *C.* § 2255 [hereinafter Defendant's Reply].) The Supreme Court said in *Teague* that "a case announces a new [constitutional] rule when it breaks new ground or imposes a new obligation on the States ir the Federal Government." *Teague*, 489 U.S. at 301, 109 S. Ct. at 1070. Alternatively, a new rule exists if it "was not dictated by precedent existing at the time the defendant's conviction became final." *Id.*

Gaudin established a new constitutional rule. *See United States v. Bilzerian*, 1996 WL 524340, at *14 (S.D.N.Y. Sept. 13, 1996) ("*Gaudin* is clearly a new rule for retroactivity purposes.")' *Waldemer v. United States*, 911 F. Supp. 1105, 1113 (S.D. III. 1996)

(holding same); *United States v. Holland*, 919 F. Supp. 431, 434 (N. D. Ga. 1996) (holding same), *aff'd*, 85 F. 3d 643 (11th Cir. 1996). First, it broke new ground by reversing both Supreme Court and District of Columbia Circuit precedent. Second, since *Gaudin* directly opposed earlier precedent, the state of the law before *Gaudin's* announcement could not have dictated *Gaudin's* holding. *Gaudin* is a new rule within the meaning of *Teague*.

2. Is Dale's Case "Final" Under Teague?

Final cases on collateral review generally should not benefit from newly announced law. The rational behind that rule focuses on deterrence and was best summarized by the Supreme Court:

> Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to . . . our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.

Teague, 489 U.S. at 309, 109 S. Ct. at 1074.

The Supreme Court has deemed "final determination" to mean cases "where the judgement of conviction was rendered, the availability of appeal exhausted, and the time petition for certiorari [] elapsed." *Id.* at 295, 109 S. Ct. at 1067 (internal quotation marks omitted). Here, in *Dale*, the jury entered its verdict on July 23, 1990. The Court of Appeals affirmed that verdict on April 6, 1993, in all respects except one. Then, the Supreme Court denied *certiorari* on December 13, 1993, thereby exhausting Dale's direct appeal. On December 13th, Dale's conviction became final under *Teague*.

Furthermore–taking a hint from Dale's choice of motions – a § 2255 motion is a habeas corpus petition which by its very nature denotes finality of judgement and exhaustion of direct appeals. As *Teague* explains, "[h]abeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgements that have become otherwise final." *Teague*, 489 U.S. at 306, 109 S. Ct. at

1073 (quoting *Mackey v. United States*, 401 U.S. 667, 682, 91 S. Ct. 1160, 1175 (1971). Under *Teague*, Dale's case is final.

III.

A. The Teague Exceptions

The announcement of new constitutional rules will have no retroactive impact on final cases unless one of two exceptions apply: the new rule decriminalizes a class of conduct or it is a watershed rule of fundamental fairness. Thus far, this Court has drawn three conclusions: (1) that *Teague* applies to federal § 2255 motions, (2) that *Gaudin* announces a new rule, and (3) that Dale's judgement of conviction is final. Since new rules do not apply to pre-existing final cases, "the habeas court need only the constitutional standards that prevailed at the time the original proceeding took place." *Id.* (Citation omitted). In other words, the state of the law is frozen at the time a case becomes final unless the case fits a *Teague* exception.

1. *Gaudin's* New Rule Does Not Decriminalize a Class of Conduct

Gaudin cannot fit into the first exception, and Dale does not argue that it does. *Gaudin* does not decriminalize a class of conduct or shield a class of people from punishment. *Accord Nazon*, 936 F. Supp. At 569 (citing *United States v. Holland,* 919 F. Supp. 431, 434 (N. D. Ga. 1995); *Bilzerion*, 1996 WL 524340, at *14. Rather, *Gaudin* is procedural in nature and has no affect on the criminal conduct for which Dale was convicted. It takes the materiality issue from the judge and gives it to the jury. Therefore, *Gaudin's* new rule cannot fit into the first exception.

2. *Gaudin's* New Rule is Not a Watershed Rule of Fundamental Fairness

The second exception applies to new rules that increase verdict accuracy and are essential to ensuring fundamental fairness. *Sawyer v. Smith,* 497 U.S. 227, 241-42, 110 S. Ct. 2822, 2831 (1990). Trading the judge for the jury as the determiner of the materiality issue as *Gaudin* does, does not increase the likelihood of

accurate verdicts of guilt or innocence, nor does ir "alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." *Id.* at 242, 110 S. Ct. 2831 (quoting *Teague*, 489 U. S. at 311, 109 S. Ct. at 1096 (citations omitted).

Dale argues that nothing can be more fundamental to a fair trial than the right to have the jury decide every element of the crime charged. (Defendant's Reply at 9.) That argument only addresses one part of the two requirements for a new rule to fit into the second exception. In addition to fundamental fairness concerns, the new rule must also increase verdict accuracy. Dale has not shown that a judge deciding the materiality of a statement is less accurate than a jury. Indeed, judges may be more accurate than juries in deciding the materiality issue. Moreover, it does not necessarily follow that because judges and juries may use different approaches in deciding the materiality issue that they in fact would arrive at different conclusions.

Finally, every subsequent refinement to a watershed rule does not qualify for the second exception. Consider the point made by the Seventh Circuit in *Jones v. Page*, 76 F. 3d 831 (7th Cir. 1996), referring to *Gideon v. Wainright*, 372 U.S. 335, 83 S. Ct. 792 (1963):

> By citing *Gideon* as an example, the [Supreme] Court did not suggest that
>
> > *all* cases expanding or defining the right to counsel would fall within the [second *Teague*] exception. Rather, the Court made clear that only those cases that truly break new constitutional ground, such as *Gideon*, require retroactive application.

Jones, 76 F. 3d at 854. The Seventh Circuit's point is clear: only a very narrow class of rules fit into the second *Teague* exception. *Gaudin* does not comfortably fit within that exception. *See Bilzerian*, 1996 WL 524340, at *14.

Because this Court concludes that *Gaudin* should not be retroactively applied to Dale's case, his conviction stands. An appropriate Order has been entered.

Date: Feb 13 1997

JOHN GARRETT PENN
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-3023 **September Term, 1997**

United States of America, No. 90cr00027-01

Appellee

Filed Jun 18 1998

v.

David M. Dale,

Appellant

Before: WALD, SILBERMAN and HENDERSON, *Circuit Judges.*

ORDER

Upon consideration of appellant's petition for rehearing filed May 29, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Robert A. Bonner
Deputy Clerk